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CITATIONS

615431—54

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 557

THE KROGER GROCERY & BAKING CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on demurrer to the indictment (R. 33–53) is reported in 51 F. Supp. 448. The opinion of January 17, 1944, of the Circuit Court of Appeals was ordered withdrawn (R. 125) and is not reported. The opinion of August 26, 1944 of the Circuit Court of Appeals (R. 89–124) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 26, 1944 (R. 124–125).

The petition for the writ of certiorari was filed October 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the allegations of the indictment are too vague and indefinite to apprise the defendants of the nature of the offenses charged.

2. Whether the allegations of the indictment sufficiently show the jurisdiction or venue of the district court.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693 (15 U. S. C. 1, 2), provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

> or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

STATEMENT

This case involves the validity of an indictment containing two counts. The first count (R. 2–19) charges a conspiracy to restrain interstate commerce in food and food products, produced, distributed and sold in many states of the United States, and the second count (R. 19–24) charges a conspiracy to monopolize a substantial part of such commerce, in violation of Sections 1 and 2, respectively, of the Sherman Act. Named as defendants were The Kroger Grocery & Baking Company, three corporate subsidiaries, and five individuals alleged to be officers, agents or employees of one or more of the corporate defendants (R. 4–5, 11).

Count one of the indictment alleges the following facts among others: Petitioners are the third largest manufacturers, processors, wholesalers, and retail distributors of food and food products in the United States (R. 11). In addition to numerous manufacturing and processing plants (R. 11–13), they own and operate twenty-five wholesale warehouses and 3,422 retail food stores (R. 10–11). These warehouses and stores are located in the states of Arkansas, Georgia, Illinois, Iowa, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Missouri, North Carolina,

Ohio, Oklahoma, Tennessee, Virginia, West Virginia, Pennsylvania, Kansas and Wisconsin (R. 10–11). Petitioners also purchase from other producers, canners, and manufacturers large quantities of food and food products (R. 13–14). They distribute food and food products not only to their own outlets but also sell to other food distributors (R. 11, 13–14).

The food and food products which petitioners manufacture or purchase in the various states are shipped to warehouses in other states and are distributed from these points to their retail stores (R. 14). These stores, as well as petitioners' wholesale warehouses, are divided into four geographical divisions (R. 10–11). Officers, agents, and employees of the headquarters of each of these four divisions are responsible for all wholesale and retail operations within the division's geographical limits (R. 10). Petitioners' retail stores requisition the commodities which they need from petitioners' warehouses and the latter invoice commodities so requisitioned at retail prices, except that fresh meat is invoiced at wholesale prices subject to the requirement that it be sold at the mark-up specified by the warehouses (R. 14). Warehouse officials exercise jurisdiction over all books and accounts of petitioners' retail stores, make frequent inventories of store stocks, and check cash receipts (R. 14–15).

By virtue of the horizontal and vertical integration of petitioners' function and business, they

have and exercise the power to dominate and control the production, prices, and distribution of a substantial part of the food and food products produced, marketed, and consumed in the United States (R. 15).

Count One charges the petitioners with having been engaged continuously since on or about January 1, 1917 to the day of the return of the indictment in a conspiracy in unreasonable restraint of interstate commerce in food and food products, and that this conspiracy consisted in a continuing agreement and concert of action to do the following (R. 2, 15–16):

(a) To acquire throughout the United States, by merger and otherwise, the businesses of independent retail grocers and local chains (R. 16);

(b) To use their dominant position to injure and destroy, in selected areas throughout the United States, the competition of independent grocers, meat dealers, and small local food chains by selling in these areas at lower prices than elsewhere and by entering into agreements with other national food chains operating in such areas to follow petitioners' prices (R. 16);

(c) To prevent competition in selected trade areas throughout the United States by combining with independent grocers and local and national food chains to fix retail prices, by combining with food manufacturers to fix and maintain resale prices, and by dividing and apportioning the trade territories in such areas (R. 16–17);

(d) To obtain discriminatory buying preference over competitors by controlling, by numerous described methods, the terms and conditions upon which manufacturers and other suppliers of food and food products shall sell to petitioners and to their competitors (R. 20–22);

(e) To foster false comparisons of their prices with those charged by competitors, and false reports calculated to conceal their activities and to perpetuate their dominance and control of the distribution of food and food products (R. 18).

The indictment alleges that the conspiracy charged in Count One "has been entered into and carried out in part" within the district in which the indictment was returned, and that within the preceding three years petitioners have performed within that district many of the acts set forth as constituting a part of the conspiracy, and, in particular, petitioners have continuously since September 1, 1939, advertised food and food products below cost for the purpose and with the intent of injuring and destroying competition of independent concerns and local chain stores (R. 19).

Count Two reaffirms and incorporates all the factual allegations of count one (R. 19). It charges a conspiracy to monopolize a substantial part of interstate commerce in food and food products and that this conspiracy has consisted in a continuing agreement and concert of action to do certain things, which are set forth in the same

terms as those which are described as having been part and parcel of the conspiracy charged in count One (R. 20–22). The allegations in support of the jurisdiction of the district court are in the same words as the corresponding allegations of count One (R. 23).

The district court sustained petitioners' demurrer upon the grounds that each count of the indictment was too vague and indefinite, that each count was duplicitous, and that neither count contained an allegation of an illegal act by the defendants within the jurisdiction of the court (R. 34–35). On January 17, 1944, the Circuit Court of Appeals reversed the judgment of the district court (R. 57–58), with District Judge Vaught dissenting on the ground that the indictment lacked the requisite particularity (R. 58, 112–114). Petitioners applied for a rehearing (R. 61–87) which was granted (R. 88). The case was reargued before all of the judges of the Circuit Court of Appeals for the Tenth Circuit (R. 88–89, 124–125). The judgment of the district court was again reversed (R. 124–125), with Judge Phillips dissenting upon the single ground that the indictment was too vague and indefinite (R. 107–110).

ARGUMENT

The indictment in this case is substantially identical with that in *Safeway Stores, Inc.* v. *United States,* now pending on certiorari, No. 481; both

cases were decided by the court below in the same opinion.[1]

1. The contention as to the indefiniteness of the indictment is the same as that presented by the petition in No. 481, and the Court is respectfully referred to the Government's brief in opposition in that case for a discussion of the question.[2] In addition to arguing that the indictment is too general, petitioners attempt to create another issue. They contend that there is also presented the question of whether an indictment, lacking the particularity required by the Fifth and Sixth Amendments, is invulnerable to demurrer and subject only to a motion for a bill of particulars (Pet. 5, 6–11, 20–25). This contention is predicated upon the unfounded assertion that the court below believed the indictment defective but, misconstruing the opinion of this Court in *Glasser* v. *United States*, 315 U. S. 60, reversed the judgment of the district court on the ground that the remedy was to apply for a bill of particulars (*ibid.*). However, that part of the opinion dealing with the question of the definiteness of the in-

[1] The opinion covered also a third case, *Frankfort Distilleries* v. *United States*, which was decided against the United States on an entirely different ground, going to the merits, and which is now before this Court on the Government's petition for certiorari (Nos. 523–30, this Term).

[2] The brief in opposition in No. 481 (pp. 10–11) also argues that review should not be granted in the present posture of that case. This argument is equally applicable to the present petition.

dictment read in its entirety clearly reveals that the court believed the allegations sufficiently specific to fulfill constitutional requirements, and correctly citing the *Glasser* case,[3] stated that further details should be sought by a motion for a bill of particulars (R. 97–102).

2. Petitioners do not contend that the holding below with respect to the allegations of jurisdiction and venue is in conflict with any decision of this Court or of another circuit court of appeals. The question presented is simply whether the court below properly applied established principles. The court below followed and relied upon the decision in *United States* v. *New York Great Atlantic & Pacific Tea Company,* 137 F.

[3] Petitioners imply, in part by an ambiguous statement of facts not contained in the opinion, that the decision on this point in the *Glasser* case is confined to allegations of overt acts in indictments charging conspiracies under Section 37 of the Criminal Code (Pet. 22–24). An examination of the record and briefs in that case demonstrates that the implication is incorrect. Only count two, not count one, of the indictment in that case was before the Court. 315 U. S. at p. 63. It was contended in this Court that the allegations of the charging paragraph, either standing alone or amplified by the allegations in the paragraphs describing the "manner and means" by which the conspiracy was to be effected, were too vague and indefinite. It was not claimed that the allegations of the acts actually done "to effect the objects and purposes" of the conspiracy and which were set forth under the caption "Overt Acts" were defective. Record in Nos. 30–32, 1941 Term, 28–37; Brief for the Petitioner, Glasser, 27–30, Kretzke, 24–33, and Roth, 59–65.

(2d) 459 (C. C. A. 5) (R. 101–102). Both decisions apply the same principles to almost identical allegations[4] and arrive at the same conclusion. The question was raised in the petition for certiorari in that case, which was denied. 320 U. S. 783.[5] The application of these principles to the instant indictment is not of general importance.

The decision of the court below is clearly correct. There are positive allegations in each count that the conspiracy was "formed" and that it was "entered into" in part within the District of Kansas (R. 16, 19, 20, 23). A conspiracy under the Sherman Act is complete when it is formed and does not require either allegation or proof of an overt act in furtherance thereof, and the offense is committed and therefore may be tried in any district in which the conspiracy was formed as well as in any district where it has been carried out. *Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 402–403; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 252.

The indictment further explicitly alleges in each count that the conspiracy was "carried out" in part within the district of indictment (R. 16, 19, 20, 23). This is supplemented by the allega-

[4] Comparison of the two indictments demonstrates that petitioners' attempt to distinguish them (Pet. 25–26) is specious.

[5] See petition for certiorari in No. 397, 1943 Term, 8–9, 25–29.

tion that petitioners have performed in such district many of the acts the commission of which is charged as being a part of petitioners' conspiracy (R. 19, 23). Moreover, there is specification of particular overt acts performed within the district of indictment, namely advertising food and food products below cost for the purpose and with the intent of injuring and destroying the competition of independent concerns and local chain stores (R. 19, 23). If petitioners, in order adequately to prepare their defense, require further particulars, this is the function of a bill of particulars.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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